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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

WATSON BROS. TRANSPORTATION CO., INC.

On Appeal from the United States District Court for the District of Nebraska

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1, of the Revised Rules of the Supreme Court of the United States, appellee Watson Bros. Transportation Co., Inc., hereinafter called Watson, moves the court to affirm the judgment sought to be reversed on appeal on the ground that it is manifest that the question on which the decision of the court depends is so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal, pursuant to 28 USC 1253 and 2101(b), from the final judgment entered June 27, 1955 by a specially constituted three-judge district court, convened pursuant to 28 USC 2284 and 2325, permanently restraining and enjoining enforcement of an order of the Interstate Commerce Commission, hereinafter called the Commission, entered August 25, 1953 under docket No. MC-70451, *Watson Bros. Transportation Co., Inc.*

The said order of the Commission, set forth in the appendix to appellants' Jurisdictional Statement, pp. 7a-10a, averred in substance that the operating rights embraced in the certificate issued to Watson on July 19, 1949 had been inadvertently described and directed that a "corrected certificate be issued". *The order did not state that the certificate itself had been inadvertently issued.*

Under its certificate of July 19, 1949, Watson is authorized to, and does, engage as a motor-common carrier in the transportation of general commodities "to and from the site of the Rocky Mountain Arsenal near Denver, Colo., Iowa Ordnance Plant near Burlington, Iowa, Sunflower Ordnance Plant near DeSoto, Kans., and Savanna Ordnance Plant near Savanna, Ill., as off-route points in connection with said carrier's authorized regular and irregular route operations." The effect of the Commission's order was to revoke a substantial and valuable portion of the foregoing rights. Specifically, it would revoke (1) the right to transport general commodities, substituting in lieu thereof the right only to transport Class A and B explosives; (2) the right to transport

Class C explosives; and (3) the right to serve between the named Government installations, on the one hand, and, on the other, points in its irregular-route territory, leaving it authority to serve only between the installations and points on its regular routes.

The order was issued by the Commission without notice and without affording Watson an opportunity to be heard prior to its promulgation and entry; and this despite the fact that the certificate had been in effect for more than four years and, as the Commission was fully aware was its purpose, the operations authorized by it had during that period been integrated into and made part and parcel of Watson's system of operation and would, if voided, have a disruptive effect on its system generally.

Watson's certificate had these antecedent facts. On December 22, 1947 its various separately granted operating rights were consolidated into a single certificate embracing approximately 84 separate regular and irregular transportation routes over which it was authorized to transport general commodities. On about 69 of these routes the authority included dangerous explosives, but on the remaining 15 there was a restriction against the transportation of dangerous explosives. Prior to the issuance of the consolidated certificate Watson, on September 30, 1947, filed an application under section 207 of the Interstate Commerce Act (49 USC 307) seeking a certificate of public convenience and necessity authorizing the transportation of "explosives over all routes carrier is now authorized to haul general commodities". The clear intent of the application was to have uniform authority for the hauling of general commodities, including all classes of explosives, over all of Watson's trans-

portation routes, which would be accomplished by deleting the restriction against the hauling of explosives applying on the few routes above mentioned. Although under the Commission's rules carriers holding general-commodity authority excluding dangerous explosives were allowed to transport Class C explosives (e.g. "relatively safe explosives, minimum hazard") and Watson was accordingly transporting the same under its general commodity authority, its application asked for the privilege of hauling explosives without regard to whether they were dangerous or otherwise.

The evidence adduced before a Commission examiner at a hearing on the application showed that the restriction against Watson's handling of explosives over a portion of its system of routes operated to the inconvenience both of Watson and of the Government which relied upon Watson for the transportation of a large quantity of its explosive traffic. The few routes over which it was not authorized to transport explosives were intermingled with those over which it could do so. For example, its route between Omaha, Nebr., and Denver, Colo., over U. S. Highway 6 authorized the transportation of explosives between the respective termini but not at the intermediate points. Under authority of another route it was authorized to serve the said intermediate points but not in the transportation of explosives. The purpose of the application, as stated at the hearing, was to enable Watson "to transport explosives throughout and over its entire system" wherever it was authorized to handle general commodities.

An official of the Department of the Army appeared and offered testimony at the hearing showing that the public interest required that the restriction against

the handling of explosives be removed so that Watson could handle explosives over all of its routes. This testimony developed the further fact that there were four Government installations outside the scope of the application which Watson was unauthorized to serve, to and from which its services were also required; to wit, the Rocky Mountain Arsenal, Iowa Ordnance Plant, Sunflower Ordnance Plant, and Savanna Ordnance Plant. The Army witness testified that these four installations were without motor carrier service at all and that the Government had need for such service. In the light of this testimony, Watson's counsel requested permission to amend the application so as to include a request for authority to serve the four installations.[1]

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[1] In proposing the amendment, Watson's counsel stated:

" • • • the applicant at this time requests permission to amend its application in conformity with the proof that has been offered, and it is suggested by this counsel that such an amendment will not substantially broaden the scope of this application.

"This applicant is not authorized to serve the Iowa Ordnance Plant, the Sunflower Ordnance Plant, the Savanna Ordnance Depot, and the Rocky Mountain Arsenal. The Iowa Ordnance Plant is located approximately 6 miles west of Burlington, Iowa. This applicant is authorized to operate over U. S. Highway 34 which is less than 6 miles from the Iowa Ordnance Plant.

"The Sunflower Ordnance Plant at DeSoto, Kans., is less than 10 miles south of U. S. Highway 40 over which route the applicant is authorized to serve.

"The Savanna Ordnance Depot is some several miles, and this

The amendment, to which there was no objection and which was allowed by the examiner, clearly intended to cover the needs for Watson's service to and from the four installations testified to by the Army witness. This need obviously embraced as a bare minimum all types of explosives, whether Class A, B or C, as well as all components and materials required by the Government in its manufacturing operations at those installations.

The examiner served his report and order recommending that the restriction against dangerous explosives be removed from Watson's existing routes as sought in the application, and finding in addition that—

> "the present and future public convenience and necessity require operation by [Watson] as a common carrier by motor vehicle, in interstate or foreign commerce, of dangerous explosives * * * to and from the sites of the Rocky Mountain Arsenal, near Denver, Colo., Iowa Ordnance Plant, near Burlington, Iowa, Sunflower Ordnance Plant, near DeSoto, Kans., and Savanna Ordnance Plant, near Savanna, Ill., as off-route points in connection with [Watson's] otherwise authorized operations."

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counsel does not know how many miles, from Freeport, Ill., which is authorized to this applicant.

"In addition, the Rocky Mountain Arsenal is only 2 miles from Denver, Colo.

"With that explanation, applicant respectfully moves permission to amend its application so as to be able to serve to and from the Iowa Ordnance Plant near Burlington, Iowa, the Sunflower Ordnance Plant near DeSoto, Kansas, the Savanna Ordnance Depot near Savanna, Ill., and the Rocky Mountain Arsenal near Denver, Colo."

No exceptions were filed to the recommended order; and not having been stayed by the Commission, it accordingly became effective as the order of the Commission on May 18, 1949, the Commission issuing no report of its own. In framing his recommended findings, the Examiner seemingly overlooked the fact that the four installations were without motor carrier service at all and that the only reasonable interpretation of the amendment to the application was that it was intended to enable Watson to meet the Government needs for all types of explosives as well as other commodities required in its manufacturing operations. In drafting the certificate the Commission, and we submit intentionally, changed the authority (indeed, corrected the examiner's failure to grasp the military needs) to general commodities and made it conform to the purport of the evidence by affording to the Government a motor carrier service on all classes of explosives as well as all other commodities used or needed by the four installations. This was but a common sense exercise of the Commission's discretion in carrying out the national transportation policy which directs that all provisions of the act be so administered as to meet, among other things, the needs of the national defense. In addition, the Commission, apparently in the interest of precision, changed the examiner's grant of authority to serve the installations "as off-route points in connection with [Watson's] *otherwise authorized operations*" to read "as off-route points in connection with said carrier's *authorized regular and irregular route operations*". (emphasis added)

After the lapse of more than four years the Commission, as stated, summarily issued its order undertaking radically to reduce Watson's certificated

authority. Although it had afforded Watson no opportunity to adduce any facts or evidence, the Commission with equal summariness denied its petition for reconsideration of the order, on the ground "that no additional facts or evidence have been adduced to warrant a reversal or further postponement of the order".

At the trial before the three-judge district court the appellants agreed to the stipulation "that issuance of the proposed order by the Interstate Commerce Commission will result in substantial economic loss and damage to [Watson]". The district court by majority opinion found that the Commission's order "was more than the mere correction of an error; and is an attempt made contrary to sec. 212 to revoke and change a certificate duly issued"; and that since it "was issued without notice and hearing and for reasons other than those stated in Section 212(a) it is invalid". The finding of the district court that no error had been made was entirely proper and was the only reasonable conclusion to be drawn from the facts and circumstances before the court. The Commission presented no evidence at all to the court to support its allegation that an error had been made; and accordingly the court was forced to make its determination on the basis of the circumstances existing at the time the authority was granted.

THE QUESTION IS UNSUBSTANTIAL AND NEEDS NO FURTHER ARGUMENT

1. The three-judge district court properly found that no error had been made in authorizing service at the installations in connection with Watson's authorized irregular-route operations

One of the three errors which appellants allege were made by the Commission in drafting the certificate was granting the right to serve the four installations as "off-route points" in connection with Watson's "authorized * * * irregular route operations". Appellants misleadingly assert in their Jurisdictional Statement that revocation of this authority "did not alter the carrier's operating rights". This is patently incorrect, indeed contrary to the stipulation agreed to by appellants in the court below "that the proposed order by the Interstate Commerce Commission will result in substantial economic loss and damage to the plaintiff". Under this authority Watson is permitted (and its legal right to do so has never been disputed by the Commission either before or during this proceeding) to operate between the installations, on the one hand, and, on the other, its authorized irregular-route points and territories. Specifically, it is authorized to serve between such installations and all points in Iowa, practically all points in Nebraska, numerous points in Illinois, Missouri and Kansas, and a lesser number of points in Indiana and Minnesota. Clearly, the revocation of this authority would substantially alter Watson's certificate.

Appellants, although offering no factual substantiation, contend that this authority was inadvertently granted. The facts, however, belie the claimed inadvertence. The application as originally filed by

Watson with the Commission requested authority to haul explosives "over all routes carrier is now authorized to handle general commodities". A subsequent amendment filed at the Commission's suggestion requested authority "to transport explosives on [Watson's] regular and irregular routes * * * ", and listed each specific regular *and irregular* route. The evidence presented at the Commission hearing clearly showed that the authority sought and needed was between the installations and all points served by Watson on its regular *as well as irregular routes.* The examiner's recommended report and order granted authority to operate to and from the installations as off-route points in connection with Watson's "otherwise authorized operations". The "otherwise authorized operations" *included the irregular route operations.* Finally, the certificate likewise granted such authority, merely substituting for the phrase "otherwise authorized operations" the more precise phrase "authorized regular and irregular route operations"—a deviation in form, not substance. Accordingly, it is perfectly clear *that the certificate grants the authority sought by the application, supported by the evidence, and found by the examiner to be required by the public convenience and necessity.*

Where then is the "obvious inadvertency" that appellants contend may be corrected without notice and hearing? Appellants do not allege that it was a mechanical or clerical inadvertency. Instead, they assert that section 208 of the Act describes irregular-route operations as those not over specified highways or between fixed termini; that accordingly the description of off-route points on irregular routes is mean-

ingless; and that the grant of authority "plainly was intended" to give only "the right to serve the plants as off-route points on its regular routes". In other words, their position is not that an error was made in authorizing Watson to operate between the installations and the irregular route territory, *but simply that the Commission used the wrong words in describing the authority.* Their argument adds up to the bald proposition that because the language employed by the Commission in drafting the certificate was carelessly chosen as to form, the result constitutes an inadvertency which the Commission may correct, not by changing the inept language, but by wiping out the valid and substantive right which was sought, proved, and intentionally granted. And with language just as inept, appellants here describe the Commission's order as merely correcting an inadvertence without altering Watson's operating rights! If the language lacked a desired nicety of expression, the appropriate remedy was the correction of the language, *not the revocation of the validly granted right itself.*

We submit that there was no inadvertent error in granting Watson authority to serve between the installations and its irregular points and territories; that the certificate is valid with respect thereto; and that the three-judge district court properly refused to countenance the arbitrary and unconscionable attempt of the Commission to revoke this authority on the pretext of a non-existent error—all without notice and without hearing.

2. The three-judge district court properly found that no error had been made in authorizing Watson to transport Class C explosives

The second error which appellants allege is contained in the certificate is authority to transport Class C explosives, which authority the Commission's order would revoke. Appellants here likewise contend that the revocation of Class C explosives "did not alter the carrier's operating rights". Again, they seemingly forget their stipulation, *supra,* that the Commission's order would result in substantial economic loss and damage to Watson. Aside from this, however, their contention here is rebutted by Exhibit 2 which was stipulated into evidence by appellants at the trial before the district court. This exhibit shows for instance, that from one-fourth to one-third of the 102,229,038 pounds of explosives handled by Watson during 1954 at the Iowa Ordnance plant alone consisted of Class C explosives. Revocation of the right to handle this traffic would clearly, therefore, constitute a substantial alteration of Watson's operating rights. Indeed, as in the case of the irregular-route authority, such revocation would defeat the very purpose for which the authority was sought and granted—namely, to give Watson uniform authority to transport all classes of explosives over all of its transportation routes.

Appropriate at this point is an explanation of the meaning of Class A, B and C explosives. Pursuant to the Act of March 4, 1921 as amended relative to the transportation of "explosives and other dangerous articles" (now 18 U.S.C. 831-835), the Commission issued regulations, subsequently made applicable to motor carriers when the latter came under regulation,

dividing explosives into Class A, B and C. Class A is defined as "dangerous explosives, detonating and/or otherwise of maximum hazard"; Class B as "less dangerous explosives, inflammable hazard"; and Class C as "relatively safe explosives, minimum hazard". (49 C.F.R. 73.50, 73.53, 73.88, 73.100) Included under Class C are such articles as small arms ammunition, explosive cable cutters, fuses, igniters, primers, and explosive resets.

Appellants' contention that the Commission's inclusion of authority to transport Class C explosives was an error is utterly without merit. Watson's application to the Commission requested authority simply to transport "explosives" without regard to class. At no point did the testimony presented at the Commission hearing suggest that only Class A and B were to be handled. To the contrary, the commodities were repeatedly described simply as "explosives", and the examples listed in the testimony included not only such articles as TNT but also small arms ammunition, which is a Class C explosive. There can be no dispute but that the testimony clearly showed a need by the Army for a complete service on all types of explosives, there being no motor carrier service available to it at that time.

Appellants urge (at page 9 of the Jurisdictional Statement) that authority in 1953 to haul Class A and B explosives was the same as authority recommended by the examiner in 1949 to haul "dangerous explosives", citing apparently in support thereof *West Coast Fast Freight* v. *United States,* 205 F. 2d 249, 251. That case, however, involved the prosecution of a carrier authorized to transport general commodities except dangerous explosives for transporting danger-

ous explosives. The issue was whether the articles transported were dangerous explosives. The court found that they were. We do not interpret the decision as support for appellants' contention. To the contrary, in referring to the elimination from the regulations of the word "dangerous" before explosives, the court stated:

> "We see a valid reason for eliminating the word 'dangerous'. It is superfluous. When you say an explosive is a hazard, you say it is dangerous, and if it is a maximum hazard it is extremely dangerous. So, it seems clear that explosives listed by the regulations as maximum hazards are not only dangerous but extremely so."

Inasmuch as all three classes (A, B, & C) of explosives are defined in the regulations, *supra,* as hazards, the purport of the court's decision is simply that explosives are all dangerous *per se,* and that to describe them as dangerous is superfluous. If they are not dangerous explosives, there would have been no reason for including the items designated as "Class C explosives" in Parts 71-78 of the Commission's regulations dealing with the transportation of explosives and other dangerous articles, 49 CFR, *supra,* since those regulations were issued specifically under direction of Congress in section 835, Title 18, providing for proper regulations "for the safe transportation within the limits of the jurisdiction of the United States of Explosives *and other dangerous* articles". (emphasis supplied).

Class C ammunition or explosives, it goes without saying, are a highly important part of the military needs. The transcript of the hearing before the Com-

mission shows that the examiner understood the nature of the military need for Watson's service. In granting "dangerous explosives", he undoubtedly believed that the term was broad enough to include Class C explosives. It would most certainly have defied reason had he not realized that military installations lacking any motor carrier service at all would necessarily need Watson's service for the movement of all types of explosives customarily and regularly produced or stored at the installations in question and moving between such installations and points of military use or need. We submit that at the time he granted the authority, there was no reason for the examiner to have suspected that the authority recommended would not embrace all types of explosives. The application was filed September 30, 1947; the hearing was held February 3, 1949; the recommended report and order was served April 13, 1949 and became effective May 18, 1949; and the certificate was issued July 19, 1949. It was not until later that the Commission in *Strickland Transportation Co., Inc. Extension—Dangerous Explosives,* 49 M.C.C. 595, (decided August 24, 1949) *for the first time declared that dangerous explosives do not include Class C explosives,* predicating its conclusion upon the regulations governing the transportation of explosives and other dangerous articles, *supra.* Those regulations had not theretofore had any relation to grants of explosive authority in certificates of public convenience and necessity. To the contrary, they expressly stated in the first section that they related to the *mode of packaging, etc.* of explosives for transportation (49 CFR 71.1).

As stated, the *Strickland* decision undertook for the first time to make the regulations dealing with safety in transporting explosives, definitive of the scope of authority, commodity-wise, granted in certificates, even though not so stated in the certificate itself. The Commission order revoking Watson's Class C explosives authority in effect undertook to apply retroactively to that certificate a subsequently developed new policy with respect to the term "dangerous explosives", *a policy not in existence at the time Watson filed its application, at the time of the hearing, at the time the authority was granted, or at the time the certificate was issued.* The action of the Commission here is on all fours with the action it attempted in *United States* v. *Seatrain Lines,* 329 U.S. 424. There it undertook to revoke a certificate in part on the ground of alleged error. This court, however, held that there had been no error in granting the authority; that, to the contrary, the Commission was attempting to reopen an issued certificate so as to insert therein a newly-conceived policy, something that it could not lawfully do.

The grant of "dangerous explosives" to Watson included Class C explosives because they are described as of "minimum hazard", and as stated by the court in the *West Coast Fast Freight* case, *supra,* explosives that are hazards are dangerous. The grant to Watson did not restrict the authority to any definition contained in the Commission regulations covering the transportation of explosives and other dangerous articles. But in effect the Commission is reading into Watson's certificate just such a restrictive phrase, the very thing the Commission itself said it could not do in numerous cases reviewed and followed in *Coastal*

Tank Lines, Inc. v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289; sustained February 10, 1953 by unreported decision of the United States District Court for the District of Columbia.

We submit that the revocation of Watson's authority to transport Class C explosives cannot be justified on the ground of inadvertent error, and that the decision of the three-judge district court is correct.

3. The circumstances existing at the time the certificate was granted justified the conclusion of the three-judge court that no error was made in authorizing general commodities

The final error alleged by appellants to have been made in the certificate is the authority to transport general commodities. They assert that general commodities were inadvertently granted, and that since the grant exceeded explosives which was the only commodity found in the examiner's report to be required by the public convenience and necessity, the greater authority was invalid. Having presented no evidence in substantiation of the allegation of error, the issue necessarily had to be determined by the district court in the light of whether the grant was or was not consistent with the facts and circumstances existing at the time the certificate was issued. We submit that the district court, under the record in this case, correctly concluded that no error had been made.

As we have previously shown, the objective of the application was to give Watson a uniform certificate to transport general commodities and dangerous explosives over its entire system of routes, to be accomplished by deleting the restriction against handling "dangerous explosives". The Department of the Army witness not only strongly urged that this re-

striction be deleted from the existing routes but also urged that Watson be authorized to serve the four additional installations. In deleting the restriction, the examiner's report satisfied the requirement as to the existing routes where Watson already had general commodities. However, it fell short of meeting the requirements of the four installations where there was no service whatsoever and as to which no certificates were outstanding. It was reasonably apparent that the Government had need for the same service at the four installations commodity-wise that it was receiving from Watson at its other installations. In view of this, the substitution in the certificate of general commodities in lieu of dangerous explosives to and from these installations was entirely reasonable and compatible with the obvious requirements of the Army. It was likewise in furtherance of the national transportation policy which directs the Commission to administer the act so as to meet the needs of national defense. And having in mind that uniformity of authority was the objective of the application, it was but reasonable for the Commission to make the uniformity of commodities applicable with respect to the four new service points being brought within Watson's system of operations. That is precisely what the certificate accomplished. *Only by deliberate purpose could it have been framed to so adequately meet the situation disclosed of record.*

It may be that a fresh review of the matter, possibly through different eyes, may now cause the Commission to believe that an error *must* have been made four years ago. Changes in viewpoint, now arrived at, however, cannot retroactively render a perfectly reasonable act of four years ago an error as of the

time it occurred. Time inevitably diminishes recollections. The fact that the alleged error was permitted to continue for four years, that during that time Watson openly conducted the operation, that the Commission's field representatives in the territory as well as Watson's own competitors must have been fully aware thereof—all support our position that the Commission is now construing as an error what for four years was not so considered.

The certificate, having been officially issued with procedural regularity, must carry a presumption of correctness. The only thing offered by appellants to rebut this presumed correctness is the contention that it granted authority in excess of that applied for and as granted in the examiner's report. This deviation, however, does not *per se* establish error, nor render the certificate invalid. The Commission's power to grant authority in excess of that applied for is well established. *Hudson Boulevard Transit Lines, Inc.* v. *United States, et al.*, 77 F. Supp. 594. If the Commission can by an order change the scope of authority applied for, by the same reasoning it can by certificate change the scope of a preceding order. This is true because a certificate is nothing more than an order (it primarily consists of ordering paragraphs), and the only difference between it and other orders is that it is final and cannot subsequently be changed except in accordance with the provisions of section 212(a). The certificate is the final act or order that validates the operation. *Until its form and content are fixed by delivery to the carrier, the power to frame it in accordance with statutory directions persists. United States* v. *Rock Island Motor Transit Company, et al.*, 340 U.S. 419.

Appellants' contention that the certificate is invalid because not supported in the examiner's report by a finding of public convenience and necessity is hypercritical in the extreme. They are in effect using the contention that their own act is invalid as a means of sustaining their side of this controversy. This is difficult to reconcile with good conscience, for Watson, though the innocent party, alone would be injured if such contention were successful.

That the foregoing contention is but a matter of technical form rather than substance is obvious when we look at other actions of the Commission, the validity of which has never been questioned. For instance, a formal finding of public convenience and necessity for a two-way operation has been made even though the only evidence to support the finding of public convenience and necessity related to a one-way operation. *Aero Mayflower Transit Co.* v. *United States,* 95 Fed. Supp. 258. If a certificate is invalid because not preceded by a formal finding of public convenience and necessity, equally invalid should be a finding of public convenience and necessity which is unsupported by any evidence thereof. Apparently appellants would consider that a certificate is valid if supported by a formal finding of public convenience and necessity irrespective of whether such finding itself was valid. Another example is in those not infrequent cases where the Commission by interpretation of certificates increases the scope of the authority despite the lack of finding in the underlying order of public convenience and necessity for such increased authority. *Mural Trucking Service, Interpretation of Certificate—Store Equipment,* 63 M.C.C. 47.

The utter technicality of appellants position here is shown by *Robert T. Wilson and G. Bennett Wilson Extension—Dairy Products,* 61 M.C.C. 51. In that case the entire Commission issued a report finding that a proposed contract carrier operation would not be consistent with the public interest and national transportation policy and denying the application. This finding was comparable to a finding of lack of public convenience and necessity in a common carrier application. Applicant brought an action in the U. S. District Court, Western District of Missouri (Southwestern Division). That court in *Wilson and Wilson, d/b/a Wilson Bros.* v. *U. S., et al.,* 114 F. Supp. 814, held in effect that the Commission had erred in finding that no need existed for a portion of the proposed service. It set aside the Commission's order and remanded the proceeding to the Commission for further proceedings consonant with the views of the court. Significantly, the Commission did not appeal this decision which in effect directed a finding of need for the proposed service. Instead, the Commission reopened the matter for further hearing. At that hearing the applicant declined to submit further testimony on the ground that it was entitled to have the mandate of the court carried out on the basis of reconsideration of the record as made. Thereafter the Commission Division 5 reopened the proceeding for further hearing under shortened procedure for the expressed purpose of receiving verified statements (1) showing the fitness and ability of the newly-substituted applicant to perform the proposed service and (2) to receive evidence by the protesting carriers. It did not direct that the applicant present any additional evidence to support a need for the proposed service. Thereafter, the Commission Division 1 issued its report on further

proceedings, M.C.C. (MC-111290, Sub-No. 7, decided October 31, 1955) finding that the proposed operation would be consistent with the public interest and the national transportation policy and authorizing the issuance of a permit. This is a significant case because in effect the court directed the finding of a need for the service, and the Commission thereafter made such finding on the same record on which it previously was unable to do. If the argument of appellants is correct here that Watson's certificate is invalid because there was no finding by the Commission of public convenience and necessity as required by the statute, then the finding in the *Wilson* case dictated by the court and unappealed by the Commission is equally invalid as not representing a freely-found need by the Commission as required by section 209.

4. The court below having found that no error was made, the question as to the power of the Commission to correct an error is academic and needs no further argument

Appellants concede that the court below did not "in terms" hold that the Commission cannot correct inadvertent errors in a certificate without notice and hearing. They nevertheless assert that that is in effect what the court held. This contention is without merit. Before any issue could arise as to the power of the Commission to correct an error, a finding was necessary that an error had been made. Here the court found that the Commission's action was not the mere correction of a clerical error, *or in other words that no error had been made.* In that circumstance there was no need for the court to determine the Commission's power to correct errors, and had it done so it would have been pure dicta. Further comment on this academic matter seems unnecessary,

for certainly no substantial question has been raised by the decision of the court below as to the Commission's power or lack of power to correct error.

In substance the only question raised by appellants before this Court is simply whether or not the three-judge district court erred in concluding that none of the alleged errors had been made by the Commission in framing the certificate. It involves no question of law or statutory construction, and is entirely factual in nature. As we have shown, the district court was entirely justified in reaching the conclusion it did in the light of the circumstances before it. Its decision being reasonable and in no way arbitrary, a review by this court of such factual determination cannot possibly constitute a substantial question warranting further argument before this Court. Furthermore, the decision of the district court is anything but precedent-making and is unimportant insofar as concerns interstate commerce jurisprudence. The only parties to this suit are the Government and Watson. No other rail or motor carrier has ever raised any question as to the validity of Watson's certificate, and a lack of effect on them must be presumed therefrom. Aside from the injury to Watson that would result by an adverse decision, the only effect would be to deprive the Department of the Army of a motor carrier service which it has had available, and has used, since July 1949 in meeting its national defense operations. That the Commission cannot lawfully change the terms of a certificate where no error has been made has already been passed upon by this Court in the *Seatrain* case, *supra*.

We respectfully submit, therefore, that the appellants present no substantial question for the decision

of this Court, and that the judgment and decree of the district court should be affirmed.,

Respectfully submitted,

WATSON BROS. TRANSPORTATION CO., INC.,

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Of Counsel:
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Dated: November 23, 1955

Proof of Service

I, Beverley S. Simms, one of the attorneys for Watson Bros. Transportation Co., Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of November, 1955, I served copies of the foregoing Motion to Affirm on the several parties thereto, as follows:

1. On the United States, by mailing a copy, in a duly addressed envelope, with postage prepaid, to The Solicitor General; Stanley N. Barnes, Esq., Assistant Attorney General; and Daniel M. Friedman, Esq. and William J. Lamont, Esq., attorneys, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel; and Leo H. Pou, Esq., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

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1624 Eye Street, N. W.
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